STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

ALBERT B. HOAG and DONNA L. HOAG,

Defendant-Appellees.

UNPUBLISHED
July 31, 2007

No. 268234
Lenawee Circuit Court
LC No. 02-002876-CC

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

HARVEY F. SOUDERS and MARCIA K. SOUDERS,

Defendants-Appellees.

and

FARM CREDIT SERVICE OF SOUTHEAST MICHIGAN and MICHIGAN DEPARTMENT OF AGRICULTURE,

Defendants.

No. 268235
Lenawee Circuit Court
LC No. 02-002877-CC

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

HUGH DRIGGS and LEE ELLEN DRIGGS,

Defendants-Appellees.

No. 268236
Lenawee Circuit Court
LC No. 03-031177-CC

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders requiring it to pay appraiser fees and other expert witness expenses that defendants incurred in preparing their defense against plaintiff's condemnation suit. We affirm.

This case arose when plaintiff decided to expand its airport over significant portions of defendants' properties. When plaintiff resolved to expand, the Hoag and Souders defendants, who are all related to one another, owned about 140 acres of land to the west of plaintiff's airport and in the southwesterly course of an airport runway. The Hoags' mostly dormant bloc of three different parcels sat to the east of the Souderses' farm and consisted of about sixty acres. The Souderses' land was a single, nearly eighty-acre parcel that the Souders family lived on and actively farmed. The Hoags had demonstrated success at developing an unrelated portion of land just north of the properties at issue, including success in obtaining regulatory approval for the land's development as a subdivision.

In fact, successful residential development of the area around the airport was no accident. The Driggs defendants owned property south of the airport that was also affected by the new expansion. Before plaintiff initiated the expansion, however, the Driggses had arranged for the sale and strategic removal of large deposits of valuable sand and gravel, which left a void that filled with water and became a lake. In the 1990's the Driggses successfully subdivided the property and sold off lakefront lots just south of the airport and east of the Hoags and Souderses. The record reflects that the Driggses' success with the tandem mining and development operations prompted the Hoags and Souderses to duplicate the process on their lands. Because the Hoags' land was farther east and closer to the end of the existing runway, it was encumbered by an avigation easement that prevented the Hoags from using the land in ways that would interfere with the safe taking off and landing of aircraft. Nevertheless, the airport had an identical easement against portions of the Driggs property and the licensee of its sand and gravel rights, so the easement did not dissuade the Hoags and Sauderses from moving forward with the development of their parcels as a combined bloc of land. A few months before plaintiff initiated this action, the Hoags and Souderses entered a partnership agreement to effectuate their plans to develop the combined land.

On July 23, 2002, plaintiff instituted condemnation actions against the Hoags and Souderses in accordance with the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. The anticipated expansion extended the existing runway southwest across the Hoag portion of the combined properties and included a field beyond the runway that extended well into the Souderses' farmland. The expansion also greatly extended and increased the burden of the requisite avigation easements for the combined properties. The trial court consolidated the cases. Plaintiff brought a condemnation action against a portion of the Driggses property the following spring.

The Hoags and Souderses hired several experts to assess their property's various attributes and an expert appraiser to compile the data into a final evaluation. There is some dispute over whether the Hoags and Souderses started this evaluation process before they knew

about the airport's plans to take their property. In any event, the expert appraiser concluded that the "market value" approach failed to provide an adequate estimate of what the property was actually worth, so he opted to employ a "development" approach to estimate the value of the land remaining after the taking in relation to what the land would have been worth as one combined parcel. Plaintiff moved to strike the appraisal, claiming that the appraiser underestimated the effect of the avigation easement on the Hoag's ability to create a manmade lake. Plaintiff argued that the lake would attract dangerous waterfowl, which would violate the easement's catchall provision against doing anything that might affect the safety of departing or landing aircraft. Plaintiff argued that the Hoags' inability to develop a lake on their land seriously undermined the basis for their appraiser's estimate of the combined properties. Plaintiff also insinuated that the "development" method used to appraise the properties had "questionable" validity. The Hoag and Souders defendants responded that the Driggses had the same easement encumbering their nearby property, and yet they had mined sand and developed a lake without any problem with the airport. Nevertheless, the trial court agreed with plaintiff's arguments and ruled that the easement precluded the Hoags from developing a lake on their property.

After plaintiff's inferences in its motion to strike, the Hoags and Souderses brought a motion in limine to prevent plaintiff from challenging the "development" method at trial. Plaintiff responded that the method was plainly invalidated, and even illegalized, in *City of Detroit v Hartner*, 227 Mich 132; 198 NW 839 (1924). The trial court agreed with plaintiff and ruled that the "development" approach would not be presented at trial.

Meanwhile, the Driggses had used roughly the same group of experts and the same appraiser to compile an evaluation of the losses they would incur as a result of the partial taking of their land. At the time of the hearing on the Hoag and Souders defendants' motion in limine, however, the Driggses had not completed their appraisal. The Hoags and Souderses paid their appraiser to reevaluate the properties in light of the court's ruling, and the revised appraisal was completed about the same time as the appraiser completed the Driggs appraisal. After deposing the appraiser, plaintiff challenged the defendants' revised appraisals. However, the trial court sent the matter to facilitation where the parties resolved their dispute over the lands' fair market values and settled their respective cases, reserving only the matter of reasonable costs and expert fees.

After settlement, defendants moved the trial court to order plaintiff to reimburse their expert witness fees in accordance with MCL 213.66. In turn, plaintiff moved to bar defendants' recovery of the fees because the trial court had ruled that the method used by the expert appraiser was invalid and the vast majority of the appraiser's fees were spent proposing an invalid theory of compensation. Plaintiff also argued that some of the experts that defendants' had employed were duplicative and unnecessary, and some of the fees were simply not reimbursable under the law. However, plaintiff put off thoroughly reviewing the presented information regarding defendants' costs until the trial court ruled on the basic issue, because plaintiff's attorney felt that line-by-line analysis might be moot if the trial court ruled that none of the fees should be reimbursed. At the hearing, the trial court ruled that the law did not clearly preclude defendants' proposed "development" approach, so the appraisals, and the fees of the experts who provided information for its compilation, were still reasonable expenses in preparation for trial and recoverable under MCL 213.66. The trial court then provided an opportunity for plaintiff to

review the expenditures more closely and raise any objections at a later telephonic hearing. At the later hearing, however, and after defendants submitted documents and various paid invoices supporting their experts' activities and charges, plaintiff failed to raise any particularized objections to any specific expert activity and related fee. Instead, its attorney reiterated plaintiff's general objections to reimbursement for any fees related to the disavowed "development" method. After disallowing postage and similar costs, the trial court adhered to its previous ruling about the general reasonableness of the experts' actions and granted defendants' motions for reimbursement of its expert's fees.

Plaintiff first argues that the trial court erred by allowing defendants to recover fees for experts that were used to compile a "development" approach. We disagree. The trial court's interpretation of MCL 213.66 is subject to de novo review, *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006), but we review for abuse of discretion a trial court's determination of the reasonableness of an expert witness's fee. *City of Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 295; 730 NW2d 523 (2006). The reimbursement of expert witness fees is mandatory under MCL 213.66, which states:

> (1) Except as provided in this section, an ordinary or expert witness in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.
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> (5) Expert witness fees provided for in this section shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. For the purpose of this section, for each element of compensation, each party is limited to 1 expert witness to testify on that element of compensation unless, upon showing of good cause, the court permits additional experts. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned.

Plaintiff first argues that the appraiser and other experts should not receive any reimbursement for services that only furthered the "illegal" and inadmissible "development" method. Plaintiff relies heavily on *Hartner*, *supra*, for the proposition that the appraiser's use of the "development" approach precludes reimbursement of his fee. However, *Hartner* does not suggest that an appraiser must turn a blind eye to the potential developed value of a parcel. In fact, the trial court in *Hartner* clearly allowed the jury to hear evidence of the how the property could possibly be platted and developed. The Court approved the trial court's instructions, which included the following:

> "The purpose of allowing the witnesses to go on and project into the future a plat of the acreage out there was to show not only the present value, but to show its present value for the purposes for which it could be used. Now you can readily see that when a man has ten acres of land and he is going to plat it, there are certain contingencies that must arise before he realizes on it. There is the cost of

> putting it on the market. There is the investment. There are many things that you cannot tell just how they will turn out. Maybe they will be this, and maybe they will be that. It is, to some extent, more or less of a speculation as to just exactly what a man would realize in dollars and cents at a certain period when he has put in improvements and changed the character and aspect of his property up there. So you see, gentlemen of the jury, if you roam off into that field, you are in a field of uncertainty. You should only take that testimony and that projected platting and selling and the income from it, to ascertain what you would pay for it in its naked state as acreage before you started to do it. Therefore, when the question was asked, what is that worth an acre now as it stands for the purposes for which it can be used best, platting, — that is the basis of your calculation." [*Id*. at 137-138.]

Therefore, *Hartner* does not stand for the proposition that a property's development potential is *per se* irrelevant or that testimony regarding development is illegal. Instead, *Hartner* carefully distinguishes between the price a property would fetch with its raw potential alone and the price it would fetch if it were already fully developed without ever facing, much less realizing, any risk of failure or setback. This is not a disavowal of the validity of evidence that land has a given degree of development potential, but an admonition that any potential must be recognized as unfulfilled.

Plaintiff's argument also fails to appreciate the original appraisal's relevance to the best possible use of the Hoag and Souders properties. "[T]he proper amount of compensation for property takes into account all factors relevant to market value." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 381; 663 NW2d 436 (2003). A property's best possible use, its location, and its various sources of wealth are essential to determining what a willing buyer would pay for the land.[1] See *In re Acquisition of 306 Garfield*, 207 Mich App 169, 182-183; 523 NW2d 644 (1994); *Detroit Plaza*, *supra* at 268; *Hartner*, *supra*.

In this case, defendants persuasively argued that the properties' best possible use was residential development. For the Hoags and Souderses, the original appraisal sought to narrow that use to the more particularized and even better (more valuable) use of the property as lakefront development. However, because of the necessity of demonstrating something more than mere speculation, the Hoags and Souders defendants, and their original appraisal, went to great lengths to emphasize the fact that until it was condemned, the Hoag/Souders property stood a strong chance of repeating the success that the Driggses had already realized. Although the

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[1] Plaintiff's own actions prove the rule. In the trial court, plaintiff successfully moved to strike the appraiser's first appraisal because it failed to account for an obscure hindrance to the Hoags' land, the avigation easement. Without expert analysis of the effect of the easement on the property's *development* value, plaintiff could not argue that the appraisal was overestimated. If a willing buyer would pay as much no matter what the soil conditions, then that same buyer would not factor an avigational easement (or the existence of wetlands) into the decision to purchase the land. This is not the law. A trial court should consider all the factors that affect the land's fair market value, whether they increase or decrease that value. *Silver Creek*, *supra* at 381.

original appraisal went too far in quantifying the Hoags' and Souderses' loss in terms of lost lot revenue, most of the analysis would prove extremely interesting, insightful, and persuasive to a potential purchaser. In fact, the original appraisal reads like a business or investment proposal, touting the potential, but unrealized, value of the property. To varying degrees, the appraisal accounts for both competition and risk. Given the success of the Hoags and Driggses with the development of nearby property and the appraiser's determination of the inferiority of the straight market approach, it was not unreasonable for the Hoag and Souders defendants to present their appraisal in a developed format to demonstrate the massive potential of their property's best use. As in *Hartner*, any discrepancy between reality and speculation could be resolved at trial, and the hindsight afforded by the trial court's later ruling in limine should not distort the analysis of the reasonableness of the appraiser's fee. Instead, we defer to the trial court's ability to determine the reasonableness of the expense for the Hoag/Souders original appraisal, mindful that fees under MCL 213.66(5) are mandatory even for issues that are disposed of before trial.

Regarding the Driggses appraisal, plaintiff's argument amounts to speculation that a phantom development appraisal was created, suppressed, and then billed to defendants under the guise of a flat fee. Given our position that the trial court did not abuse its discretion about the reasonableness of paying for a development analysis in this case, however, we see no reason to pursue the matter further. The trial court did not abuse its discretion by ruling that the appraisals in these cases represented a reasonable expense for preparing the defendants for trial.

Regarding the other experts, defendants presented ample evidence in the trial court that the fees incurred were reasonably necessary to evaluate the parcels' various assets and lack of encumbrances, including the value of the parcels' mineral rights and the lack of wetlands. Plaintiff does not challenge any specific activity of any particular expert as completely irrelevant to the land's value or its adaptability to its best use, but instead vaguely claims that the trial court should have reduced its award by those fees that were expended appraising the property with an eye toward presenting the improper development method. Although plaintiff generally categorizes all the experts' analyses as preparation for presenting the "illegal" development theory, plaintiff fails, even on appeal, to differentiate between those costs that exclusively related to "development" and those that merely determined the potential value of the various parcels. From our review of the record, all the experts that defendants retained contributed some measure of insight into what a potential buyer might be willing to pay for the properties, so we find no abuse of discretion in the trial court's rulings.

Next, plaintiff argues that defendants hired too many experts, because the statute allows reimbursement for only one expert for each "element of compensation," and the only element of compensation in this case was the actual fair market value of the land. MCL 213.66(5). However, plaintiff stops short of arguing that a condemnation plaintiff and defendant may never call more than one witness each at a trial, even though the relevant question in these cases can always be distilled down to "just compensation." Plaintiff also fails to account for the mandatory reimbursement of "reasonable expenses for preparation" required by MCL 213.66(1). Given the number of factors that potentially relate to a land's value, *Silver Creek*, *supra*, and the necessity of proving the validity of those factors at trial without relying on hearsay, we are not persuaded that the statute requires such a narrow interpretation of the term "element." See, e.g., *Michigan State Highway Com v Cousineau Gravel, Inc*, 58 Mich App 405, 228 NW2d 856 (1975). It is

enough for our purposes that, despite ample opportunity, plaintiff has never demonstrated that defendants unreasonably or unnecessarily duplicated the work of their experts. Therefore, plaintiff fails to demonstrate that reimbursing defendants for their experts contravenes the statute.

Plaintiff's next argument insinuates that defendants' appraiser engaged in "strategy" sessions that are not reimbursable under *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). However, plaintiff fails to point to any evidence for its assertions aside from the flat fee charged by the appraiser. We will not reverse the trial court's finding that the appraiser charged a reasonable fee merely because plaintiff speculates that the flat fee anticipated illicit strategy sessions. Moreover, the reasonableness standard relates to the fee charged, and plaintiff has failed to demonstrate how the fee was unreasonable in comparison to the work done.

Plaintiff next argues that Mr. Souders conceded in his deposition that he retained the appraiser and a sand and gravel expert before plaintiff initiated this condemnation action. However, plaintiff failed to develop its two-sentence argument with any citation to relevant law in the trial court. Furthermore, plaintiff never even raised the issue as a challenge after the trial court opened the door to particularized objections, and it has not properly developed the issue on appeal. Although limited, Mr. Souders's testimony does raise legitimate questions about whether the initial work of the appraisal was a reasonable expense "for preparation and trial" under MCL 213.66(1), or whether, and to what degree, the appraiser's "services were reasonably necessary to allow the owner to prepare for trial" under MCL 213.66(5). However, when placed in the limited context that is available, the bare testimony does not provide enough reason to preclude recovery of any portion of the fees in this particular case. Mr. Souders explained that he thought he hired the appraiser to assess the properties' development potential and value, but the appraiser's function changed relatively quickly after he hired him to appraise the property. He added that the actual appraisal produced was different from the appraisal originally envisioned, because the new appraisal required a comparative analysis of the land before and after the taking. Mr. Souders mentioned that the original, anticipated appraisal, was no longer necessary because the property was being condemned.

We first note that the statute does not specifically require that an expert witness must be hired after litigation commences for the services to qualify as "reasonably necessary" to prepare the owner for trial. MCL 213.66. In this case, the appraisal was "reasonably necessary" to proceed to trial, and it would not make any sense to stop the initial appraisal, only to resume it later for litigation, or to continue appraising the property for personal reasons with knowledge of its imminent condemnation. In any event, no details were ever provided, or apparently ever requested, regarding the appraiser's division of time and labor before and after litigation commenced, notwithstanding plaintiff's opportunity to raise and develop this specific objection to the appraiser's fee. Given the apparent timing of the appraisal's initiation, the appraiser's flat fee, the ambiguities in Mr. Souders's testimony, and plaintiff's failure to develop its argument in the trial court, we are not persuaded that the trial court abused its discretion by concluding that the appraiser's services were reasonably necessary to this litigation and reimbursable in full.

Similarly, we reject plaintiff's final argument regarding transcript fees. For authority, plaintiff cites a single, unpublished opinion, *Novi v Evans*[2], for the proposition that transcript fees are not a recoverable expense. However, that case is not binding, MCR 7.215(C)(1), and is distinguishable. In this case, the deposed experts used their own transcripts to prepare their testimony for trial, and in the cited case, one expert apparently collected fees for review of other deposition transcripts. In any event, we are not persuaded that the trial court abused its discretion by determining that the nominal fees were reasonable trial preparation expenses under the circumstances of this case.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[2] Unpublished per curiam opinion of the Court of Appeals, issued June 3, 1997 (Docket Nos. 1183034 and 191690).